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No. 584

In the Supreme Court of the United States

OCTOBER TERM, 1959

EDWARD LEWIS SHORT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (R. Vol. III, 334-343) is reported at 271 F. 2d 73.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1959 (R. Vol. III, 344). A petition for rehearing was denied on November 13, 1959 (R. Vol. III, 345). The petition for a writ of certiorari was filed on December 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly denied petitioner's motion to dismiss the indictment, grounded on the contention that it was defective under Alaska Territorial law because it did not contain the names of the witnesses examined by the grand jury.

STATUTES AND RULE INVOLVED

The pertinent statutes and rule provide as follows:

Section 66-8-52, Alaska Compiled Laws Ann. (1949):

> That when an indictment is found the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court; and if the indictment be for a misdemeanor only, and any witness has voluntarily appeared before the grand jury to complain of the defendant, his name must be marked as private prosecutor.

Section 66-11-1, Alaska Compiled Laws Ann. (1949):

> The indictment must be set aside by the court, upon the motion of the defendant, in either of the following cases:
>
> * * * * *
>
> Second. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon.

Rule 7(c), Federal Rules of Criminal Procedure:

> The indictment or the information shall be a plain, concise and definite written statement of

the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. * * *.

STATEMENT

The grand jury for the District Court for the Territory of Alaska returned an indictment in October 1957 which charged petitioner with bribing Walter O. Smith and T. H. Miller (the latter the Chief of Police of the City of Ketchikan) to prevent their interfering with petitioner's gambling activities, in violation of Section 65-7-4, Alaska Compiled Laws Ann. (1949) (R. Vol. I, 3-4). The indictment did not set out the names of the witnesses who appeared before the grand jury which returned the indictment. Following a trial by jury, petitioner was convicted (R. Vol. I, 4) and sentenced to a term of 5 years. Four years and six months of that sentence were suspended and petitioner was placed on probation during that period (R. Vol. I, 5-7).

ARGUMENT

Petitioner's sole contention is that his conviction should have been reversed because the indictment failed to contain the names of witnesses as required by the Alaska Compiled Laws 66-8-52. The Court of Appeals for the Ninth Circuit indicated, in a prior case, that this provision was abrogated when the Rules of Criminal Procedure were made applicable to the Alaskan courts. *Soper* v. *United States*, 220 F. 2d 158, 159, fn. 2; certiorari denied,

350 U.S. 828.[1] It refused to reconsider that ruling here, noting that in all events petitioner had not been prejudiced by the lack of endorsement of the names of witnesses.

The question has no future significance in view of Alaskan statehood. The prior conclusion of the court below—that the provision for the names of the witnesses is inconsistent with the requirement of Rule 7 (c) that the indictment or information shall be "a plain, concise and definite written statement of the essential facts constituting the offense charged" —is, at the least, a reasonable one.[2] There is no occasion for further review by this Court.

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[1] As the court below noted at the outset of its opinion, there was not question as to its appellate jurisdiction, the district court's judgment having been rendered prior to Alaskan statehood.

[2] Petitioner's citation of numerous state cases which have held that statutes identical to the Alaska statutes involved here are mandatory are inapposite since they involve no question of overriding Federal rules.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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JANUARY 1960

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 935701 887